

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GREGORY HUBBARD,)	
)	
Petitioner,)	
)	
v.)	C.A. No. 02-320-SLR
)	
THOMAS CARROLL, Warden,)	
)	
Respondent.)	

Gregory Hubbard, Delaware Correctional Center, Smyrna, Delaware.
Petitioner, pro se.

Thomas E. Brown, Deputy Attorney General, Delaware Department of
Justice, Wilmington, Delaware. Counsel for Respondent.

MEMORANDUM OPINION

Dated: February 5, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Gregory Hubbard is an inmate at the Delaware Correctional Center in Smyrna, Delaware. Currently before the court is petitioner's application for habeas corpus relief pursuant to 28 U.S.C. § 2254. (D.I. 2) For the reasons that follow, the court concludes that petitioner's application is without merit and shall be denied.

II. BACKGROUND

On May 11, 2000, petitioner was convicted by jury of first degree robbery, second degree robbery, and possession of drug paraphernalia. (Cr. D.I. 45)¹ On July 14, 2000, petitioner was sentenced to 12 years imprisonment. (Cr. D.I. 49) Petitioner appealed his conviction to the Delaware Supreme Court on July 28, 2000. (Cr. D.I. 51) Petitioner also filed a second appeal challenging a finding by the Superior Court that he was in violation of the terms of his probation in connection with an unrelated April 1995 first degree robbery conviction by guilty plea. (Cr. D.I. 53) Because petitioner's sentences resulting from the conviction and the violation of probation were interrelated, his appeals were consolidated. On September 5, 2001, the Delaware Supreme Court affirmed both petitioner's conviction and sentence and the violation of probation decision

¹References to petitioner's Superior Court criminal docket shall be designated as "Cr. D.I." References to the civil docket in this case shall be designated "D.I."

of the Superior Court. Hubbard v. State, 782 A.2d 264 (Del. 2001).

Petitioner has now filed the current application for federal habeas relief. In his application, petitioner alleges: (1) the Delaware Supreme Court misapplied the mandate in Franks v. Delaware in determining his claim that a nighttime search warrant was premised on false statements was without merit; (2) a denial of his right to due process in his state proceedings due to the failure of the state to provide notice of two violation of probation ("VOP") hearings; and (3) a violation of the Confrontation Clause of the United States Constitution because the state did not disclose that Angela Benson would testify at his trial. (D.I. 2) Respondent asserts that each of petitioner's claims is without merit and the application should be denied.

III. DISCUSSION

A. Petitioner's Illegal Search Claim

Petitioner first argues that the Delaware Supreme Court misapplied Franks v. Delaware, 438 U.S. 154 (1978) in denying his claim that a nighttime search warrant was premised on a false statement. (D.I. 2 at 4) Petitioner asserts that the detective applying for the search warrant falsely stated in his declaration that petitioner "confirmed that his address is 1307 E. 28th Street, Wilmington, Delaware." (Id.) On appeal, the Delaware

Supreme Court assumed that the statement was false but went on to hold that since petitioner failed to challenge the accuracy of the address, the source of the address was irrelevant and, therefore, even if the source were excluded, the warrant would still contain sufficient information to support probable cause to search that address. (Id. at 5); See Hubbard v. State, 782 A.2d 264, ¶ 18 (Del. 2001). Petitioner argues that under Franks, a defendant who challenges a warrant claiming the source of information is false does not also have to challenge the veracity of the information given by the allegedly false source. (D.I. 2 at 5)

Respondent argues that review of petitioner's illegal search claim is precluded by Stone v. Powell, 428 U.S. 465 (1976). (D.I. 11 at 5) In Powell, the Court held

that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U.S. at 494. Respondent notes that on March 31, 2000, the Superior Court conducted a suppression hearing on petitioner's motion challenging the warrant. The Delaware Supreme Court then reviewed and affirmed the Superior Court's ruling denying the motion, thus, petitioner had an opportunity for full and fair litigation of his claim in the state courts. (D.I. 11 at 6)

The court agrees with respondent. Even if petitioner's

claim had merit, a federal court may not review the claim if the petitioner had a full and fair opportunity to litigate the claim in state court. See Deputy v. Taylor, 19 F.3d 1485, 1491 (3d Cir. 1994) ("Even otherwise potentially meritorious Fourth Amendment claims are barred on habeas when the petitioner had a full and fair opportunity to litigate them."). Since the undisputed record shows that petitioner has had the opportunity to challenge the warrant in both the trial court and on appeal, this court may not review petitioner's claim on the merits.

B. Petitioner's Due Process Claim

In his second claim, petitioner argues that the state deprived him of due process by not notifying him of two VOP hearings. (D.I. 2 at 8) On April 20, 1995, petitioner pled guilty to a charge of first degree robbery. (D.I. 2 at 9) He was sentenced to five years in prison which was suspended after serving the statutory minimum two years, with the balance to be served on probation. (Id.) On April 27, 2000 at a VOP hearing, the Superior Court held that petitioner's bank robbery charges in the current case amounted to a violation of his probation.

Petitioner contends that he was not notified or allowed to be present at the April 27, 2000 VOP hearing which amounts to a due process violation under the Fourteenth Amendment. (Id.) Respondent argues that the Delaware Supreme Court addressed these arguments on appeal and dismissed them on procedural grounds

under Supreme Court Rule 8 for failure to present the arguments at trial.² (D.I. 11 at 7) By applying the procedural bar of Rule 8, the Court articulated a “plain statement” under Harris v. Reed,³ that its decision rested on adequate and independent state law grounds. Therefore, respondent contends that under Wainwright v. Sykes,⁴ federal habeas review would be improper unless petitioner has shown cause for his procedural default and resulting prejudice.

The respondent’s position is supported by the caselaw. In its opinion, the Delaware Supreme Court stated “Hubbard did not raise this claim below; therefore, we review it for plain error.” Hubbard v. State, 782 A.2d 264, ¶ 32 (Del. 2001). The Court then applied the plain error test, which provides that the Court “will generally decline to review contentions not raised and not fairly presented to the trial court for decision. The failure to object at trial usually constitutes a waiver of a defendant’s right to raise the issue on appeal unless the error is plain.” Probst v. State, 547 A.2d 114, 119 (Del. 1988). In determining whether an error is plain, the Court stated that

[u]nder the plain error standard of review, the error

²Delaware Supreme Court Rule 8 provides that “[o]nly questions that have been fairly presented to the trial court may be reviewed [on appeal].”

³489 U.S. 255, 263-64 (1989).

⁴433 U.S. 72 (1977).

complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.

Id. at n.5 (internal citations omitted). The Court then concluded that petitioner and his counsel had notice of the VOP hearing and, in fact, petitioner's counsel appeared at the hearing and raised no objection to the hearing on the ground of inadequate notice. Hubbard, 782 A.2d at ¶ 32. As such, the Court concluded that there was no plain error and petitioner's claim was precluded by Rule 8. Id.

This court has consistently held that Rule 8 is an independent and adequate state procedural rule which precludes federal habeas review. See Lawrie v. Snyder, 9 F. Supp. 2d 428, 452-53 (D. Del. 1998); Dawson v. Snyder, 998 F. Supp. 783, 825 (D. Del. 1997); Lazano v. Snyder, 1996 U.S. Dist. LEXIS 12418, *14-15 (D. Del. Aug. 12, 1996). Therefore, petitioner's due process claim is not reviewable by this court.

C. Petitioner's Confrontation Clause Claim

In his third claim, petitioner argues that the State violated his Sixth Amendment Confrontation Clause right and his Fourteenth Amendment due process rights by failing to give him notice that the State would be calling a "key witness," Angela Brown, during his trial and failed to disclose potential

impeachment evidence about her. (D.I. 2 at 12) He asserts that the State purposely and intentionally failed to disclose that Benson had been forced to cooperate with police or she would be incarcerated and lose her children and her home. (Id. at 13)

Petitioner presented this issue for the first time on direct appeal to the Delaware Supreme Court. In addressing these arguments the Court stated that "Hubbard points to no credible evidence to substantiate this conclusory allegation.

Furthermore, the record reflects that defense counsel had the opportunity to cross-examine Angela Benson fully on the issue of her cooperation with police and on any other aspect of potential bias." Hubbard, supra, at ¶ 21. The allegations in petitioner's habeas application are similarly conclusory and devoid of any credible evidence substantiating such claims. Courts in this circuit have held that bald assertions and conclusory allegations do not entitle a petitioner to habeas relief. See Mayberry v. Petsock, 821 F.2d 179, 185-86 (3d Cir. 1987); DeShields v. Snyder, 830 F. Supp. 819, 823-24 (D. Del. 1993). Furthermore, as the Delaware Supreme Court noted, petitioner had a full and fair opportunity to cross-examine the witness at trial and test her credibility. Therefore, in the absence of any credible support for petitioner's claim in the record, his application fails to show a basis for habeas relief.

IV. CONCLUSION

For the reasons set forth above, the court finds that petitioner's claims for habeas corpus relief under 28 U.S.C. § 2254 are either procedurally barred or otherwise fail on the merits. Therefore, the court will dismiss the petition for habeas corpus relief with prejudice and deny the writ. Additionally, the court finds no basis upon which to issue a certificate of appealability. An appropriate order shall issue.

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Respondent.)	

O R D E R

At Wilmington this 5th day of February, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254 (D.I. 2) is dismissed and the writ denied.

2. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Sue L. Robinson
United States District Judge